IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6453

JONEY JOE LUSTY,

Petitioner,

- v -

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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INDEX

TABLE OF CASES

STATUTES

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered September 17, 1975.

CITATIONS TO OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at 542 P.2d 545 (Okla. Cr. App. 1975) and is set out as Appendix A hereto, pp. 1a-9a, infra.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

The opinion below was reaffirmed on rehearing on November 25, 1975. On February 17, 1976, Mr. Justice White extended the time within which a petition for certiorari might be filed until March 24, 1976.

QUESTIONS PRESENTED

1. Does the post facto invalidation of a statutory provision empowering an appellate court to conduct an evidentiary hearing and thereafter to reduce the death penalty imposed for the crime of first degree murder violate Article I, Section 10 of the Constitution or the Fourteenth Amendment, where the effect of such an invalidation is to subject a criminal defendant to a irreducible death sentence that was not authorized by law at the time of his offense?

2. Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Oklahoma violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

3. Did the release during trial of a sequestered juror for the purpose of inspecting the scene of the burglary of her home violate petitioner's Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the Ex Post Facto Clause of Article I, Section 10 of the Constitution of the United States.

2. This case also involves the following provisions of Oklahoma law:

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

"Murder in the first degree.

"Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or any other human being, is murder in the first degree in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus, or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21. Okla. Stat. Ann. §701.3 (1975-76 Supp.)

"Punishment for murder in the first degree -- Instructions regarding lesser and included offenses.

"Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death. In a case where a jury trial is waived, and

the case is tried to the court, or upon a plea of guilty to the court, upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

21 Okla. Stat. Ann. §701.5 (1975-76 Supp.)

"Review of judgment and sentence of death.

"The Court of Criminal Appeals when reviewing a judgment and sentence of death shall, in the first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are no errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

21 Okla. Stat. Ann. §701.6 (1975-76 Supp.)

"Modification of death sentence.

"Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the penitentiary at hard labor."

STATEMENT

Petitioner was convicted of murder during the course of an armed robbery after a jury trial in the District Court of Oklahoma County.[1/]

The victim, Raymond Martin, had been the resident manager of a building (T. 199) in which petitioner and William Dale Davis shared an apartment (T. 174). His body, which had suffered 86 stab wounds (T. 183), was found in his apartment on the morning of March 30, 1974 by his sister, Kathryn Gadberry. (T. 192.) Ms. Gadberry testified that a revolver was missing from the apartment; that her brother kept his savings pinned to his pocket; and that he kept approximately ten dollars in change in a plastic container, approximately one hundred and fifty dollars in his billfold and painted coins in a peanut butter jar. (T.193-95.) She identified, as having belonged to her brother, a watch and a set of keys (T. 197) which were, according to the testimony of a police officer, recovered at the home of petitioner's brother (T. 345-46) and a knife (T. 197) which petitioner had helped the police to recover (T. 365-66).

The owner of the apartment building explained that the painted coins were used to operate the building laundry machines (T. 199), identified coins recovered from petitioner as "looking like the color" of the painted coins used for this purpose (T. 200) and testified that Raymond Martin kept a .22 automatic (T. 201). Two police officers testified that they

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1/ He "was jointly charged and previously tried, along with William Dale Davis; however, at that proceeding the jury found his co-defendant guilty of First Degree Murder, but was unable to agree upon a verdict with respect to [petitioner]." Lusty v. State, supra, at ___.

were present when the coins were taken from the petitioner's pockets and that, at the time, petitioner was "passed out" on the floor of his jail cell (T. 306, 312-13); another officer who was present testified that they were recovered after petitioner was awakened and asked to come outside the cell, during a search in which petitioner cooperated (T. 434).

Four versions of the events leading to the death of Raymond Martin were presented. Officer Guinn, who was in charge of the investigation, testified that after initial denials petitioner told him that he and Davis had decided to pay their rent; that after opening his door to them Martin turned and Davis jumped him, killed him and took his billfold; that the two men searched the apartment and Davis found and took a .22; that they split the money from the billfold; and that they removed their possessions from their apartment and discarded them in the back of the building, walked some distance and then split up. (T. 324-26.) Petitioner's written statement to this effect was admitted in evidence. (T. 339.) Officer Guinn testified that petitioner later added that he had taken a purse which had been pinned inside Martin's pocket and contained a bundle of $100 dollar bills, and that he had given the bills to his brother. (T. 329-31.) The bills were recovered at the home of petitioner's brother. (T. 332.) Guinn also testified that Davis had directed him to a knife other than the one taken from the Martin apartment and that Davis had identified it as the knife "used by himself to stab the apartment manager and kill him." (T. 335, 340.)

Officer Knight had talked with petitioner after the interview with Officer Guinn. (T. 358.) He testified that petitioner's account was that at about 5:00 on the evening of March 29, Davis asked petitioner if he wanted to go with him to rob Martin. Petitioner was not sure that Davis was serious, but said that he would think about it. He then went to sleep until

10:00. (T. 362.) When he awakened Davis renewed the suggestion and petitioner said he didn't know whether Martin had any money; Davis said that he did, and petitioner agreed to go along. (Ibid.) The two agreed that petitioner would be admitted more easily, so he stood in front of the peephole and told Martin that he wanted to pay the rent. After the door was opened Davis "jumped in from behind grabbed him from behind the neck with one arm and started stabbing him . . . .This continued into the kitchen." (T. 363.) After Martin fell, Davis took a butcher knife from a drawer and gave it to petitioner, and petitioner put it in his belt. (T. 363-64.) An essentially similar written statement was admitted in evidence. (T. 374.)

William Dale Davis, advised that anything he said could be used against him in the event of a retrial in this matter (T. 416), testified that he killed Raymond Martin and that prior to the killing he had not discussed robbing or killing Martin with any other person (T. 424) and that petitioner had not known of his plan to rob and kill Martin (T. 425). The witness admitted convictions for grand larceny, "unauthorized use" and murder (T. 426) but denied signing a written statement offered by the state as an exhibit and bearing his name (T. 426-31). The State presented four witnesses who testified that he had signed the statement. (T. 487, 488, 491, 493.)

Petitioner, who was twenty years old at the time of his trial (T. 445) testified that he had not stabbed the victim. (T. 455.) His account was that Davis, who often talked of robbing people, had suggested robbing Martin and that he had refused and gone to sleep. (T. 456.) Davis later awakened him and said that he was going to pay the rent; petitioner said that he would do it for him because Davis had been sniffing paint and "his mind was messed up." (T. 456.) He denied prior knowledge of Davis' plan to rob and kill Martin, admitted taking money and

other items from the apartment and testified that Davis had threatened to kill him if he reported what had happened. (T. 460-61.)

Petitioner also testified that the statements which he had given to the police were given after he had asked for and been refused counsel (T. 453, 458) and that they had been the product of fear and intimidation engendered when he was threatened and knocked unconscious in his cell shortly after his arrest (T. 449-51). His account of the beating was corroborated by the testimony of Ronald Wayne Smith, an inmate who was sharing a cell with petitioner at the time but had no contact with him before or after the beating incident. (T. 401-04.) Smith admitted that he was under a fifty year sentence and had been convicted of three or four felonies. (T. 401.) The State's evidence was the petitioner was drunk (T. 314) and "belligerent" upon his admission to jail (T. 433), and had struck an officer (T. 437, 205-06) and had to be removed to an isolation cell (T. 433).

After deliberating for one hour and thirty-one minutes, the jury[2/] returned a verdict of guilty. (T. 585.) Petitioner was accordingly sentenced to "death by electrocution." (T. 595.)

2/ Three of the four prospective jurors who expressed scruples regarding the death penalty had been excused for cause. (T. 25, 50, 138.) Each juror had said at voir dire that he or she could find the defendant guilty of first degree murder even if he did not do the actual stabbing. (T. 65-66, 103, 117-118.)

During the course of the trial one of the jurors was informed that her home had been burglarized (T. 376), and that although the jury was sequestered, she would be permitted to go to her home, determine what had been taken and discuss the incident with the police. (T. 376-377.) She was accompanied by the trial judge, the prosecuting attorney and counsel for petitioner. (T. 382.) Questioning of the juror regarding her reaction to the news was as follows:

> "[BY THE COURT]: I know anybody would be upset about their house being broken into. This is a very important case that we are on right here, right now. What I want to know from you is: I would take it that you -- that anything that someone might have done to your house out there won't carry over to your judgment in this case, would it?
> MRS. WOODS: No.
> THE COURT: Would it influence you in any way, shape or form after that fact that--You know, I don't know exactly what happened. All I am doing is repeating what your daughter and the police officers say, that it was broken into.
> I assume then, if that did happen, that that is the facts, why then you and your husband would have been the victims of a crime. Right? What I want to know is: Would you, in any way react and hold it against this Defendant or the State or anybody in connection with it because of this thing that happened at your house? Would it influence your judgment in this case or make you feel vindictive toward the Defendant or the State?
> MRS. WOODS: No.
> THE COURT: It wouldn't carry over, would it, into this?
> MRS. WOODS: I don't know, I don't think so.
> THE COURT: You don't think so. Do you have any idea about it?
> MRS. WOODS: I don't know. I am just a bit overcome.
> THE COURT: Well, I want to give you a chance to think about that because I want to know. I felt

this way, Mrs. Woods: I felt like your husband is, according to what you told me earlier, and your daughter told me, your husband is on a business trip and they can't locate him.

And I thought it would be an awfully poor thing to do to wait until Friday or Saturday to tell you about it.

I just found out about it this afternoon, you see. I thought you had a right to know, and that is why I wanted to tell you.

It is your home and I think you have a right to know this. But we also can't, we have got to know whether or not you think this would influence your judgment in the case. Would it have any effect upon you as to whether or not this Defendant is guilty or not guilty of this crime?

MRS. WOODS: Oh, no, no.

THE COURT: You think if I let you go out there and meet with the officers and check with them whatever is necessary, your daughter will be there to look after the place, you will of course, have to return back to the Jury Room. You understand?

Is there any reason why you may think you could continue on with your duties of this case?

MRS. WOODS: I think so."

(T. 376-378.)

The record reflects no admonishment to Mrs. Woods to refrain from discussing the incident with other jurors or to attempt to set the incident aside when she resumed her duties as a juror. An alternate juror was available (T. 264) but was not seated (T. 584).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In points 6 and 7 of his Petition in Error to the Oklahoma Court of Criminal Appeals, petitioner raised respectively, the propriety of Juror Woods separation from the jury for the purpose of inspecting the scene of a burglary of her home, and the federal constitutionality of the imposition of the death penalty. These issues were argued as Points I and II of the Brief of Appellant below, and specifically determined against petitioner by the Court of Criminal Appeals. Lusty v. Oklahoma, supra, 542 P.2d at 550.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

- and -

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF

OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to spare the Court repititious argument, petitioner adopts, as to these issues, the reasons set forth at pages of the Petition for Certiorari in Green v. Oklahoma, filed March 24, 1976. The relevant portions are attached as Appendix B.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RELEASE DURING TRIAL OF A SEQUESTERED JUROR FOR THE PURPOSE OF INSPECTING THE SCENE OF THE BURGLARY OF HER HOME VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JURY.

Petitioner's right to a jury trial entitled him to "a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961). These principles must be scrupulously adhered to when life is at stake, id. at 728, see generally, Williams v. Georgia, 349 U.S. 375, 391 (1955); Stein v. New York, 346 U.S. 156, 196 (1953); Andres v. United States, 333 U.S. 740, 752 (1948); Reid v. Covert, 354 U.S. 1, 77 (1957)(concurring opinion of Justice Harlan). And they encompass the right to assure that the jurors who will determine the fate of the accused are not influenced by the psychological impact of prior involvement in a crime of the kind which the prosecution will attempt to prove. Jackson v. United States, 395 F.2d 615 (C.A.D.C. 1968);

United States ex rel. De Vita v. McCorkle, 248 F.2d 1 (C.A. 3, 1957). They encompass as well the right to a jury which is the product of full and free investigation of matters which will affect the ability of a juror to judge the facts impartially, Ham v. South Carolina, 409 U.S. 524 (1973), and the product of resultingly informed challenges for cause and preemptory exclusions, see United States ex rel. De Vita v. McCorkle, supra, 248 F.2d at 2,3.

In a capital case in which a juror is informed, mid-trial, that she has been the victim of a crime similar in nature to the crime of which the defendant is accused, even a clear statement that her judgment of the case would not be affected would have been suspect since "the psychological impact requiring such a declaration is often its father." Irvin v. Dowd, supra, 366 U.S. at 728. But in petitioner's case, the juror was permitted to resume her duties despite ambiguous responses to inquiries regarding the impact of the news that she had been the victim of a burglary. T. 376-378, quoted at p. supra. Moreover, she was not questioned at all after having been taken to her home to inspect the scene of the crime and assist in the police investigation. Nor was she admonished that the crime which she had suffered should not affect her deliberations. She was not even told to refrain from discussing the crime with her fellow jurors.

The conscientious effort of the trial judge to bring to light at voir dire any similar past occurrences which might

have pre[illegible]ced petitioner's right to a fair trial[3/] were vitiated by his refusal to take the convenient, prudent alternative of seating the available (T. 584) alternate juror.

Petitioner's right to be judged purely on the basis of the facts in evidence was doubtlessly -- and unnecessarily -- compromised when Ms. Woods returned to the sequestered panel, doubtlessly suffering the trauma of her loss, free to share her experience with fellow jurors and uninstructed as to her duty to separate her feelings about the burglary and its investigation from her feelings about the burglary and its the prosecuting attorney and police officers testifying in behalf of the state. The Sixth and Fourteenth Amendments forbid such compromises.

3/ The panel was questioned as follows:

> "THE COURT: Now, I want to ask you, each one of you, have any of you ever had any experience in your life where some member of your family or a loved one or a close friend has ever been involved in something like this, murder? That would cause you to have some feelings one way or another, that might influence your judgment in this case? Any of you ever had anything that would cause that?

T. 52.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JONEY JOE LUSTY,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

FOR PUBLICATION

No. F-75-71

- OPINION -

PER CURIAM:

Appellant, Joney Joe Lusty, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Oklahoma County, Case No. CRF-74-1175, for the offense of Murder in the First Degree, in violation of 21 O.S. Supp. 1974, § 701.1. His punishment was fixed at death, and from said judgment and sentence a timely appeal has been perfected to this Court.

The defendant was jointly charged and previously tried, along with William Dale Davis; however, at that proceeding the jury found his co-defendant guilty of First Degree Murder, but was unable to agree upon a verdict with respect to the present defendant. See, Davis v. State, Okl. Cr., ____ P.2d ____, F-75-38 (1975).

At the trial, Officer Ronald Chambers of the Oklahoma City Police Department, testified that he was called to 1219 N.W. 8th Street, Oklahoma City, on March 29, 1974, to investigate a homicide. He arrived at the two-story frame apartment house shortly after 11:00 a.m., and identified State's Exhibit No. 1 as a photograph of that structure. Upon checking the manager's apartment, he noticed the door ajar, but observed no indication of forced entry. The witness found the victim lying on the floor on his back in the kitchen. The victim's front pants pockets were observed to have been turned inside out. The left pocket bore an open safety pin. The victim appeared to have multiple stab wounds in the upper part of the chest and the left abdominal area. A great amount of blood was observed. The officer found a waffle-type design shoe print on the kitchen floor, unlike the smooth soles of the victim's

shoes. Later, the officer observed the same waffle-type design, in blood, just outside the door of Apartment No. 9. The doorknob of Apartment No. 9 bore bloodstains and a drop of blood was observed on the lower door facing. A sketch was drawn in court on a blackboard reflecting the floor plan of the manager's apartment, and revealing the location thereof in relation to the hallway and Apartment No. 9. Records at the manager's apartment reflected that Apartment No. 9 was rented to Mr. Lusty and one Willie Davis. State's Exhibits Nos. 2 through 6 were identified as photographs of specific areas, and State's Exhibit No. 7 was identified as one of the homemade ledgers found in the manager's apartment. Exhibits No. 1 through No. 7 were then admitted into evidence.

The State's second witness, Dr. Tom L. Hewitt, testified that he was an Assistant State Medical Examiner and performed an autopsy on one Raymond Martin. The victim was found to have eighty-one (81) stab wounds and five (5) incised wounds. Twenty-seven (27) of these wounds entered vital organs, of which any one of nine could have caused death. State's Exhibit No. 6 was identified as a photograph of the person on whom he performed the autopsy. State's Exhibit No. 8 was admitted as a wound diagram drawn by the witness. State's Exhibit No. 9, one of two sheets used to draw the wound diagram, was admitted. State's Exhibits Nos. 12 and 13, photographs reflecting the location of stab wounds, were admitted. After observing State's Exhibits Nos. 10 and 11, two knives, the witness stated that either one of the knives could have caused the stab wounds.

The State's third witness, Kathryn Gadberry, testified that on March 30, 1974, she went to the apartment of her sixty six year old brother and, upon discovering his body, notified the telephone operator. She could not find the .22 caliber revolver that the victim kept. She related that he was saving money for his retirement and kept it pinned in his trouser pocket. He kept change marked with green paint in a glass peanutbutter jar, and in a plastic margarine container for use in the washer and dryer machines. The victim kept approximately $150.00 in his billfold, and also had collected the rent on the previous night. She identified State's Exhibits Nos. 10,

14 and 15, respectively, as the victim's knife, watch and keys. She identified State's Exhibit No. 6 as a photograph of her brother.

The State's fourth witness, Ken Welsh, testified that Raymond Martin had operated rental property for him at 1219 N.W. 8th Street, and that five dollars worth of marked dimes and quarters were left with him to operate the washing and drying machines. The coins were marked with blue-green paint. Certain coins, marked as State's Exhibit No. 16, were identified as having the same color. He testified that he turned over to the police the paint which was used to mark the coins. He further testified that previously he had seen a .22 caliber weapon that Mr. Martin kept in his apartment.

Officer Donald E. Chandler, of the Oklahoma City Police Department, then testified regarding the arrest of defendant at his brother's house on March 30, 1974. He further testified about an altercation which had occurred at the jail, in which defendant had struck one Officer Jackson.

After an in camera hearing, Officer Bill Snipes testified that on March 30, 1974, he proceeded to the jail to see defendant for the purpose of checking for coins. The defendant was passed out in his cell. When defendant's pockets were turned out, coins rolled out. One of the coins, a dime, bore light green paint and was admitted into evidence as State's Exhibit No. 17.

Homicide and Robbery Division Detective, Jerry Lee Guinn, testified that he was placed in charge of the investigation. At the rear of the apartment house, he observed a garbage can containing a white towel with apparent bloodstains. Male clothing and pieces of paper bearing the names of Joney Lusty and William Davis were also found. On March 31, 1974, he interviewed and advised defendant of his Miranda rights, which defendant stated that he understood. After being confronted with the painted dime, the defendant stated at first that he did not remember where he had gotten it. After being told about the investigation regarding the paint, defendant stated that he wanted to tell the truth. He related that he had moved out of the apartment, but after talking with Davis, he decided to go pay the rent to the apartment manager. Defendant knocked on the door and told the manager that they wanted to pay the rent. As the manager was

walking toward the kitchen, Davis jumped him from behind and began stabbing him in the back. The manager fell down and Davis began stabbing him in the chest. After Davis removed the manager's billfold, the two split $250.00. Davis also removed a .22 caliber pistol. Defendant then stated that he searched the victim's pockets, finding a coin purse pinned inside. He placed the coin purse in his pocket and forgot to tell Davis about it. After splitting up with Davis, defendant opened the coin purse, around Second and Walker, finding a large number of one hundred dollar bills. He threw the coin purse away. He and Davis both had taken change from the peanutbutter jar. He further stated that he left an envelope full of one hundred dollar bills at his brother's house on S.E. 18th Street. Officers took defendant to this address where he told his brother, Leonard Lusty, that they were there to pick up the money that he had left with him. The officer followed defendant's brother to a bedroom where the brother removed the back from a radio and took out a white envelope which the witness identified as State's Exhibit No. 19, containing thirty-six (36) one hundred dollar bills. Defendant then took officers to a location where Davis had thrown away a box of personal belongings. The officers recovered some bloodstained clothing and papers with Davis' name. On April 5, 1974, Guinn interrogated Davis, first giving the Miranda warnings. Davis denied any knowledge, but when confronted with Lusty, he told officers that he wanted to tell his side of the story. He took officers to an alley where State's Exhibit No. 11, a knife, also identified as being in the photographs marked as State's Exhibits Nos. 20, 21 and 22, was recovered. Davis stated that he used the knife to stab Martin. State's Exhibits Nos. 11, 20, 21 and 22 were admitted into evidence. Defendant's confession, marked as State's Exhibit No. 18, and the money, State's Exhibit No. 19, were also admitted.

Police Lieutenant Don R. Schimmels testified that after obtaining a search waiver from Leonard Lusty he recovered a watch identified as State's Exhibit No. 14; keys, identified as State's Exhibit No. 15; and a goat-skin bag containing five (5) one hundred dollar bills, identified as State's Exhibit No. 23, from the residence at 705 S.E. 18th Street. A dime bearing green paint recovered from the southeast bedroom of this residence was marked as State's Exhibit No. 24. State's Exhibits Nos. 14 and 15 were

admitted. State's Exhibits Nos. 23 and 24 were not admitted at this time.

Leonard Lusty testified that he was defendant's brother and that the defendant gave him thirty-six (36) one hundred dollar bills, State's Exhibit No. 19, and also five (5) one hundred dollar bills, State's Exhibit No. 23, for safekeeping.

Detective Adam Knight of the Oklahoma City Police Department, testified that on April 1, 1974, at approximately 4:30 p.m., he interrogated defendant in the city jail, first giving the Miranda warnings. Defendant told him that he and Davis, at approximately 10:00 p.m. on March 29, 1974, decided to rob Martin. Defendant went to the door of Martin's apartment and knocked, saying he wanted to pay his rent. Martin looked through the peephole and admitted defendant and Davis. Davis jumped Martin from behind and began stabbing him. Davis then took a butcher knife from the kitchen drawer and gave it to defendant, who put it in his belt. They took Martin's billfold, watch, and other articles. Defendant showed Detective Knight where he had hidden the butcher knife, State's Exhibit No. 10, and Knight recovered it. Defendant's oral statement was then incorporated in a written statement, State's Exhibit No. 25. At this point, the State rested its case in chief.

For the defendant, Ronald Wayne Smith testified that for a brief period he was a cellmate of defendant at the city jail on March 31, 1974. There were three guards and when an argument arose over defendant's request to make a phone call, more guards were called and one of them beat defendant with a club.

After being advised of his rights, Willie Dale Davis testified that he was the one who had killed Mr. Martin, and denied that he had discussed it with defendant or that defendant had participated in it. He further denied signing certain exhibits.

Officer Joseph P. Jackson testified that he was the jailer on duty when defendant was brought to the jail. Defendant appeared to be drunk and was belligerent. When defendant struck Jackson, he was put in an isolation cell. There he was searched. Jackson denied that defendant had been struck or clubbed by any officers.

Taking the witness stand in his own behalf, the defendant testified that when he was first jailed he was put in a cell with Ronald Wayne Smith. An officer accused him of killing Martin and when he denied it, the officer accused him of lying. Three or

four officers gathered and Officer Jackson opened the cell door and the officers struck defendant with a club and kicked him several times. He lost consciousness and when he awoke he was in an isolation cell. On the afternoon of March 31, 1974, Officer Guinn read him the Miranda warnings, which defendant understood. He signed the three pages of the written statement he made, State's Exhibit No. 18. He stated that although he asked for a lawyer, one was not brought in to advise him. He denied stabbing Martin and stated that he accompanied Davis to the apartment merely to pay the rent. He knocked on the manager's door and was admitted. In two or three seconds, Davis entered, grabbed Martin from behind, and commenced stabbing him. Defendant tried to stop Davis, ". . .but he just kept on stabbing him . . ." [Tr. 459]. He testified that he was shocked and that Davis came over and put some of the victim's money into his pocket. Defendant stated he then became curious, so he checked the victim's pockets and found an envelope with hundred dollar bills in it. Defendant related that Davis had warned him not to snitch and that he was afraid of Davis. They left the apartment and Davis got rid of his bloody clothes and defendant went to his brother's house. Saturday he got to drinking beer with his brother and gave him the money for safekeeping. Defendant had the police officer read State's Exhibit No. 25 to him and he then signed it, but could not really understand all of it. The defense then rested, and the State presented the testimony of four rebuttal witnesses.

On rebuttal, the State called Officer Jerry Guinn, Officer Larry Upchurch, Terry Binswanger and Marilyn Scott. All four identified State's Exhibit No. 26 as the written statement taken from Willie Davis on April 3, 1974. They were all present at the time the statement was taken and they all observed Mr. Davis sign the statement. This concluded the testimony given at trial.

Defendant's first assignment of error alleges that the jury was improperly separated after sequestration. In particular, the home of one of the jurors, Mrs. Woods, was burglarized the first night of sequestration. Her husband being out of town on business, no one could be located to apprise the police of what, if anything, had been taken in the burglary. The court resolved this difficulty by appointing a

special bailiff, who accompanied Mrs. Woods in a deputy's car to her residence. The trial judge, an assistant district attorney, and the defense counsel, also went to Mrs. Woods' residence and were present while she discussed the burglary with police officers and her daughter. Upon being informed of her misfortune, the trial court questioned her in regard to what impact, if any, the burglary would have on her ability to render an impartial judgment in the instant case. She replied that it would not influence her judgment in the case, or make her feel vindictive toward either the defendant or the State.

Defense counsel did not question Mrs. Woods' sincerity in answering the questions about whether her misfortune would affect her fairness or ability to sit as a juror. Nor was it contended that any improper communication was made to Mrs. Woods concerning any issue or aspect of the pending trial. Rather, it was counsel's objection that the mere apprising Mrs. Woods of her burglary and allowing her to view the details and discuss it with police, rendered her mentally and emotionally incapable of serving as a juror, and that her exposure to the other members of the jury could have likewise affected them. Counsel contends that the simple and safe solution would have been for the court to discharge Mrs. Woods and seat the alternate juror.

After a careful examination of the record, we cannot agree with this contention. The procedure for seating an alternate juror is governed by 22 O.S.1971, § 601a, which provides that an alternate juror shall be seated only in case a regular juror be discharged because of illness or death before the case is submitted to the jury for their determination. Therefore, it would appear that the trial court, in the case at bar, could not have seated the alternate juror in this situation.

As a result of numerous decisions, it is well established that, after final submission, the separation of the jury or any action subjecting them to outside influence is presumed to prejudice the defendant and the burden is on the State to prove otherwise. Before final submission, the courts are clear upon the matter of separation. The burden of proof is upon the defendant to show prejudice or denial of a fair trial. See, Hayes v. State, Okl.Cr., 397 P.2d 524 (1964). Accordingly, the burden of

showing prejudice or denial of a fair trial, in the instant case, was upon the defendant and the mere contention that Mrs. Woods was rendered mentally and emotionally incapable of serving as a juror and that her exposure to other members of the jury could have likewise affected them, without more, is in and of itself insufficient to meet this burden. This becomes even more apparent when consideration is given to the fact that the trial court, upon questioning Mrs. Woods, elicited answers from her indicating that her decision would not be affected in any way by her misfortune. Therefore, we find this assignment of error to be without merit.

In his final assignment of error, the defendant contends that the death sentence is unconstitutional by virtue of the decision of the United States Supreme Court in the consolidated cases of Furman v. Georgia, Jackson v. Georgia and Branch v. Texas, 408 U.S. 233, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). However, in this regard we need only observe that this contention was thoroughly analyzed and rejected by this Court in the consolidated opinion of Williams and Justus v. State, Okl.Cr., ____ P.2d ____, F-74-648 and F-74-650 (1975).

The evidentiary hearing contemplated under the provisions of 21 O.S.Supp. 1974, §§ 701.5 and 701.6 was previously assigned and heard by this Court. No evidence was offered by either the defendant or the State upon that hearing. Rather, shortly prior thereto, the defendant filed a motion requesting that this Court establish guidelines for the review of death sentences under those statutory provisions. As we have since held in our decision in Williams and Justus v. State, supra, that these provisions are unconstitutional, no further discussion thereof is necessary here.

Pursuant to Rule 1.11 of this Court, 22 O.S.Supp.1974, Chp. 18, App., this case was previously assigned and heard for oral argument. We have now carefully reviewed the entire record before this Court, and thoroughly considered the argument and authority presented, and have determined that the record is free of any error of law requiring reversal. The judgment and sentence is, accordingly,

AFFIRMED.

Pursuant to Rule 1.18, 22 O.S.Supp.1974, Chp. 18, App., the defendant is advised that any Petition for Rehearing herein must be filed with the Clerk of this

Court within fifteen (15) days of the date upon which this Opinion is filed therein.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE JOE CANNON, JUDGE.

JONEY JOE LUSTY was convicted for the offense of First Degree Murder; was sentenced to Death, and appeals. Judgment and sentence AFFIRMED.

DON ANDERSON, PUBLIC DEFENDER,
Attorney for Appellant,

LARRY DERRYBERRY, ATTORNEY GENERAL,
BILL J. BRUCE, ASST. ATTY. GENERAL,
Attorneys for Appellee.

PER CURIAM.

APPENDIX B

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

In 1972, this Court held that the penalty of death could not be inflicted under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). Oklahoma's extant capital punishment statutes were thereby invalidated. Koonce v. Oklahoma, 408 U.S. 934 (1972); Fesmire v. Oklahoma, 408 U.S. 935 (1972); Menthon v. Oklahoma, 408 U.S. 940 (1972).[3]

Effective May 17, 1973, the Oklahoma legislature devised new measures for the imposition of the death penalty for the newly defined crime of first degree murder.[4] 21 Okla. Stat. Ann. §§701.1, 701.3, 701.5 and 701.6 (1975-76 Supp.). Under the 1973 enactment, homicides committed "without authority of law" and with "premeditated design" to effect death are murder in the first degree if committed under any of ten circumstances:

> "1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;
>
> "2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;
>
> "3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial

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3/ See also Pate v. State, 507 P.2d 915, 916 (Okla. Cr. App. 1973): "After an exhaustive study of the opinions rendered by the Supreme Court of the United States, this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia."

4/ Prior to Furman, kidnapping for ransom, armed robbery and rape were also punishable in Oklahoma by death. 21 Okla. Stat. Ann. §745 (1958); 21 Okla. Stat. Ann. §801 (1958); 21 Okla. Stat. Ann. §1115 (1975-76 Supp.).

or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

If a first degree murder case is tried to a jury, the jury "shall determine only whether the defendant is guilty or not guilty . . . and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death."[5] In the event of a first degree murder conviction after a bench trial or upon a guilty plea, "the court shall enter a judgment and sentence of death."[6] The statute authorizes capital juries to be instructed "regarding

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5/ 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

6/ Ibid.

lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions" and if "the judge . . . states into the record his reasons for giving the instruction based upon the evidence adduced at trial."[7] Although §701.3 states that "[e]very person convicted of murder in the first degree shall suffer death,"[8] §701.5 requires the Court of Criminal Appeals to conduct "an evidentiary hearing" in all death cases for the purpose of determining inter alia "whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Such "substantially disproportionate" death sentences must be modified to sentences of "life in the penitentiary at hard labor."[9]

7/ Ibid.

8/ Ibid.

9/ 21 Okla. Stat. Ann. §701.6. (1975-76 Supp.). Oklahoma has long permitted appellate review of criminal sentences in an unusual form. See Note, Criminal Procedure - Scope of Appellate Review of Sentences in Capital Cases, 108 U.PA.L.REV. 434, 436 (1960). Under 22 Okla. Stat. Ann. §1066 (1958), the Court of Criminal Appeals possesses power to " . . . modify the judgment appealed from." This power has been held to permit the modification of sentences, Pickman v. State, 336 P.2d 1113 (Okla. Cr. App. 1959), and has been used to reduce death sentences "in furtherance of justice," Murphy v. State, ____ Okla. Cr. ____, 112 P.2d 438, 457 (1941), on the basis of factors deemed mitigating by the appellate court, ibid.; Mitchell v. State, ____ Okla. Cr. ____, 60 P.2d 631 (1936); Methvin v. State, ____ Okla. 60 P.2d 1062 (1936); Peters v. State, ____ Okla. Cr. ____, 211 P.427 (1922), on the basis of factors thought to have prejudiced the judge or jury, Young v. State, ____ Okla. Cr. ____, 200 P.260 (1921); Mays v. State, ____ Okla. Cr. ____, 197 P.1064 (1921), on the basis of error deemed insufficiently substantial to warrant a new trial, Gibson v. State, 501 P.2d 891 (Okla. Cr. App. 1972); Sango v. State, ____ Okla. Cr. ____, 5 P.2d 400 (1931); Doublehead v. State, ____ Okla. Cr. ____, 228 P.170 (1924), or for no apparent or stated reason, Noble v. State, ____ Okla. Cr. ____, 6 P.2d 840 (1932); Jewell v. State, ____ Okla. Cr. ____, 273 P.366 (1929).

This was the law of Oklahoma as it stood at the time of the crime with which petitioner Michael Wayne Green was charged below, and at the time of petitioner's trial. It was changed, however, following petitioner's conviction and the imposition of a death sentence upon him by the trial court. In Williams v. State, 542 P.2d 554 (Okla. Cr. App. 1975), the Oklahoma Court of Criminal Appeals considered the federal constitutionality of the 1973 capital punishment statute. The court initially sustained the provisions of 21 Okla. Stat. Ann. §§701.1 and 701.3 (1975-1976 Supp.) (see pp. 2 - 4, 10 - 12 supra), governing capital sentencing at the trial level, 542 P.2d at 583-584, and it accordingly set the Williams appeal for the "evidentiary hearing" and sentence review prescribed by §701.5 (see pp. 4, 12 supra). But upon further reflection, it held that §§701.5 and 701.6 were unconstitutional insofar as those sections authorized appellate reconsideration and reduction of death sentences that were "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (see pp. 4, 12 supra); it vacated its order for an "evidentiary hearing" of Williams' appeal; and it affirmed Williams' death sentence as imposed by the trial court.

> "We are now of the opinion that 21 O.S. Supp. 1974, §§ 701.5 and 701.6, are unconstitutional. The provisions regarding the hearing contemplated therein are so vague, indefinite and uncertain that they are incapable of rational interpretation and implementation without additional legislation. Also, such a hearing is duplicitous to that procedure previously established for the presentation of evidence before the trial court upon any legal issue, including such issues as adherence to principles of due process and equal protection of the law, with this Court then fulfilling the role of appellate review rather than a court of first impression. We do not by our decision herein, however, in any manner preclude or limit the right of a defendant before this Court on appeal to present a Motion for New Trial based upon newly discovered evidence as otherwise provided for in 22 O.S. 1971, §953. See also, Rule 2.12, 22 O.S.Supp.1974, Ch. 18, App. Nothing in this opinion shall preclude the de-

fendants from asserting violation of constitutionally guaranteed rights not dealt with in this opinion in a post conviction proceeding under the provisions of 22 O.S.1971, § 1080 et seq. Further, under the mandatory scheme of capital punishment adopted by the Legislature, we are of the opinion that the proper remedy, where otherwise appropriate, for deprivation of any accused's right to due process and equal protection of the law is reversal for a new trial rather modification to life imprisonment. The exercise of such modification powers by this Court for an offense for which the legislature has otherwise mandated capital punishment would be violative of Furman. The power of this Court to modify a sentence imposed by the jury or the trial court must be within the limits of the statutory provisions governing the particular crime charged. See, Brown v. State, Okl. Cr. 314 P.2d 362 (1957). Since the Legislature has now provided but one sentence for the offense of First Degree Murder, the appropriate inquiry is whether a conviction for First Degree Murder is consistent with the law and not whether a sentence of death is substantially disproportionate to the penalty imposed in similar cases."

Id. at 583 - 84. The upshot was to leave Williams -- together with petitioner Green and others similarly situated[10/] -- subject to the penalties of death decreed upon them at the trial level without the opportunity for an evidentiary hearing and possible modification of their death sentences that had been provided by the Oklahoma statute in effect at the time of their respective offenses.

In State ex rel. Young v. Warren, 536 P.2d 965, 971 (Okla. Cr. App. 1975), the court further declared that:

10/ The Oklahoma Court of Criminal Appeals has thus far affirmed the death sentences of at least six similarly situated defendants. Davis v. State, 542 P.2d 532 (Okla. Cr. App. 1975); Williams v. State, 452 P.2d 554 (Okla. Cr. App. 1975); Justus v. State, 452 P.2d 598 (Okla. Cr. App. 1975); Lusty v. State, 452 P.2d (Okla. Cr. App. 1975); Rowbotham v. State, 452 P.2d 610 (Okla. Cr. App. 1975); Jones v. State, 452 P.2d 1316 (Okla. Cr. App. 1975).

"[s]ince the trial court is required, before giving . . . an instruction on a lesser offense, at a trial for Murder in the First Degree, to cause the record to reflect the evidence upon which he bases his instruction for the lesser offense, it necessarily follows that he may not constitutionally allow plea bargaining between the State and the defendant, or defendants, unless the following conditions are met:

"In all capital cases where a preliminary examination has been conducted on the charge of Murder in the First Degree, as in the instant case, and the testimony taken at said preliminary examination is sufficient to hold the defendant, or defendants, for trial, and the defendant, or defendants, thereafter enters a plea of not guilty at arraignment, the trial court, before permitting a reduction of the charge from Murder in the First Degree to any lesser offense, MUST require the State by competent evidence to establish that sufficient evidence exists to establish that the defendant, or defendants, was guilty of the lesser included offense, and not Murder in the First Degree. We reiterate that to do otherwise would violate the clear intent of 21 O.S. Supp. 1974, §701.3, and render unconstitutional the provisions of 21 O.S. Supp. 1974, §701.1, under the decisions of the United States Supreme Court in Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346."

See pp. 25 - 28 infra. Similar restrictions were placed upon jury instructions regarding lesser offenses and upon prosecutorial charging practices (or at least upon the practice of recharging by the filing of an amended information following dismissal of an initial charge) respectively in Murray v. State, 528 P.2d 739 (Okla. Cr. App. 1974), and Hanna v. State, 540 P.2d 1190 (Okla. Cr. App. 1975). See pp. 23 - 24 , 29 - 35 infra.

Petitioner's death sentence has been affirmed by the Court of Criminal Appeals in this context. The questions presented by his petition for certiorari, therefore, are:

(1) whether the retrospective invalidation of the appellate evidentiary-hearing and sentence-reduction provisions of Oklahoma's capital punishment statute violate the federal constitutional proscriptions against ex post facto laws and fundamental unfairness in criminal prosecutions (Part II infra);

(2) whether Oklahoma's procedures for the administration capital punishment continue -- notwithstanding the cosmetic surgery performed by the Oklahoma Court of Criminal Appeals -- to permit an arbitrarily selective

infliction of the death penalty that affronts Furman v. Georgia, 408 U.S. 238 (1972) (Part III (A) infra);

and

(3) whether the death sentence imposed upon petitioner is otherwise a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments (Part III (B) infra).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

The Court of Criminal Appeals' affirmance of petitioner's death penalty after judicially modifying on appeal the 1973 Oklahoma death penalty statute presents a substantial question under the Ex Post Facto Clause for this Court's review. First, by invalidating 21 Okla. Stat. Ann. §701.6 (1975-76 Supp.) which authorized the Court of Criminal Appeals to impose a sentence of "life in the penitentiary at hard labor" in some capital cases, it transformed a procedure whereby some first degree murderers would be sentenced to death and some to life imprisonment to one where all such persons would be sentenced to death; Second, by invalidating 21 Okla. Stat. Ann. §701.5 (1975-76 Supp.), it deprived petitioner of an important procedural right: an "evidentiary hearing" before the Court of Criminal Appeals on the question whether, inter alia, his death sentence was imposed on the basis of "any . . . arbitrary fact" or was "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant".

Although the maximum sentence both before and after the Court of Criminal Appeals' September 17, 1975, decision remained the same, the range of punishments prescribed for first degree murder was made significantly harsher. In Lindsey v. Washington, 301 U.S. 397, 401 (1937), the Court declared:

> "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. It is for this reason that an increase in the possible penalty is ex post facto . . . regardless of the length of the sentence actually imposed."

It is clear from the factual context in Lindsey that the words "increase in the possible penalty" mean a "possible increase in penalty", for both the old law and the new law provided a maximum sentence of fifteen years for grand larceny. The new law, enacted after petitioners' crime was committed, simply deprived the sentencing court of the power to impose a minimum sentence. 11/ The Court held that a sentence of imprisonment "for not more than fifteen years" imposed under this new law violated the Ex Post Facto Clause (despite the fact that such a sentence could have been imposed under the old law) because the new sentencing scheme was "more onerous" than the previous one. The Court reached its conclusion by stating flatly that the result reached below by the Court of Criminal Appeals would constitute an Ex Post Facto violation:

11/ Under the old law governing grand larceny, the sentencecourt was required to fix a minimumterm of between six months and five years, with the prisoner to be eligible for parole at any time after the minimum time was served; the new law provided that "the court . . . shall fix the maximum term of . . . sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crimes." Lindsey v. Washington, supra, 301 U.S. at 398.

> "It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." 12/

301 U.S. at 401 (emphasis added).

This case is squarely controlled by Lindsey. For the Court of Appeals' repeated insistence that Oklahoma had in 1973 enacted "an otherwise mandatory" scheme of capital punishment, Williams v. State, supra, 542 P.2d at 592, 594 recognizes that the legislature contemplated that some convicted first degree murderers would be ultimately sentenced to life imprisonment while others would receive the death sentence.

Affirmation of petitioner's death sentence after the 1973 Oklahoma death penalty was significantly altered is violative of the Ex Post Facto Clause for yet another reason. The Court's declaration in Kring v. Missouri, 107 U.S. 221, 235 (1883), that "[a]ny law passed after the commission of an offense which . . . '[i]n relation to that offense, or its consequences, alters the situation of a party to his disadvantage' is an ex post facto law," has been limited somewhat; and procedural changes which operate only "in a limited and unsubstantial manner to . . . [an accused's disadvantage" are not ex post facto. Beazell v. Ohio, 269 U.S. 167, 170 (1925). See Rooney v. North Dakota, 196 U.S. 319, 325 (1905); Malloy v. South Carolina, 237 U.S. 180, 183 (1915). However, a law which enacts a "harsh and arbitrary"

12/ "Removal of the possibility of a sentence of less than fifteen years . . . operates to . . . [petitioners'] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime . . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

Lindsey v. Washington, supra, 301 U.S. at 401-402.

procedural change, Beazell v. Ohio, supra, 269 U.S. at 170, or which takes from the accused a substantial right given to him by the law in force at the time of his crime "cannot be sustained simply because, in a general sense, it may be said to regulate procedure." Thompson v. Utah, 170 U.S. 343, 352 (1898). The Court of Criminal Appeals' ruling deprived petitioner of critically important procedural rights which are not "duplicitous" to existing procedures, Williams v. State, supra, 542 P.2d at 583. and which cannot be vindicated at a hearing on a motion for a new trial or at a post-conviction proceeding. For the Oklahoma Legislature explicitly chose to provide a hearing at which death sentences would be modified when "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Okla. Stat. tit. 21, §701.5, p.4 supra. The Court of Criminal Appeals recognized the importance of this provision when it ruled that "[a]ny attempt by this Court to delineate [a disproportionality standard] . . . would be equivalent to substantive legislation." Williams v. State, supra, 542 P.2d at 593. The Court's decision thus abolishes a procedure for demonstrating that a particular defendant's sentence is "disproportionate" (whatever the Legislature intended by this term).

It is established that the Due Process Clause imposes restraints upon courts which are identical to those imposed on legislatures by the Ex Post Facto Clause. Bouie v. Columbia, 378 U.S. 347 (1964).[13/] The Court should grant certiorari to determine

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13/ "The logical import of Bouie was . . . to extend the ex post facto principle in all its ramifications to any change in the law, whether wrought by legislative amendment, judicial construction, or administrative reinterpretation, which is applied retroactively so as to deprive a criminal defendant of fair notice not only of the criminal nature of his act but also of the punishment to which he will be subject upon conviction." Love v. Fitzharris, 311 F. Supp. 702, 703 (N.D. Cal. 1970).

whether the Oklahoma Court of Criminal Appeals' affirmance of the death sentence in this case subjected petitioner to unconstitutional punishment under the Ex Post Facto and Due Process Clauses.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has heretofore granted certiorari and scheduled oral argument in five cases raising cognate questions under the respective capital-punishment procedures of the States of Florida, Georgia, Louisiana, North Carolina and Texas. Proffitt v. Florida, No. 75-5706; Gregg v. Georgia, No. 74-6257; Roberts v. Louisiana, No. 75-5844; Woodson & Waxton v. North Carolina, No. 75-5491; Jurek v. Texas, No. 75-5394. See also Fowler v. North Carolina, No. 73-7031. In the following subsections, we describe the incidents of Oklahoma law and practice which frame similar issues meriting review in petitioner's case.

A. The Perpetuation of Arbitrary Selectivity Under the 1973 Oklahoma Capital Punishment Statute.

Despite the enactment of new death-sentencing procedures in 1973 and their partial invalidation by the Court of Criminal Appeals in 1975, Oklahoma law continues to offer a broad array of discretionary outlets through which the actual infliction of death can be avoided in potentially "capital" cases and, conversely, a capriciously selected random number of "capital" defendants can be doomed while their indistinguishable counterparts are spared.

1. Prosecutorial Charging Discretion

Felony prosecutions in Oklahoma may be initiated by indictment or by information.[14] In the "vast majority of cases, criminal prosecutions are by information." Stone v. Hope, 488 P.2d 616 (Okla. Cr. App. 1971). The county attorney has "full and complete authority to say when an information shall be filed in a felony case." Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 410 (1938). It is his duty "to guard the interests of the state, and the public, and as a quasi judicial officer to determine, before an action is filed, whether or not matters complained of constitute an offense against the state." State v. Snelson, 13 Okla. Cr. 88, 162 p. 444, 445 (1917). His decision not to prosecute may not be superceded by the complainant, Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947) or by the courts, Bent v. Evans, 297 P.2d 379 (Okla. Cr. App. 1956); Ex parte Lewis, 85 Okla. Cr. 322, 188 P.2d 367, 383 (1948); Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 210 (1938).[15]

His decision to proceed may of course be checked if, upon preliminary hearing, a judge determines "either that a public offense has not been committed, or that . . . there is not sufficient cause to believe the defendant guilty thereof." 22 Okla. Stat. Ann. §262 (1969). The consequent dismissal of an information is appealable by the prosecution, State ex rel. Fallis v. Caldwell, 498 P.2d 426 (Okla. Cr. App. 1972); and such a dismissal is also no bar to the prosecutor's refiling of an information and presenting additional evidence at a second preliminary hearing.

14/ Okla. Constitution Ann., Art. 2 §17 (1952), 22 Okla. Stat. Ann. §301 (1969).

15/ Although the grand jury might indict where the prosecutor fails or declines to proceed, it is limited in jurisdiction, 22 Okla. Stat. Ann. 338, and poorly equipped to investigate crimes and to institute prosecutions on its own initiative.

Jones v. State, 481 P.2d 169 (Okla. Cr. App. 1971); Harper v. District Court, 484 P.2d 891 (1971); Nicodemus v. District Court, 473 P.2d 312 (Okla. Cr. App. 1970).[16/]

Oklahoma prosecutors are entrusted with the choice of charges upon which to proceed:

> "it was discretionary with the prosecuting attorney to elect before trial for which offense he would prosecute the accused, where the evidence showed the commission, by the same act or transaction, of more than one offense."

Saxon v. State, 19 Okla. Cr. 58, 198 P.107, 108 (1921). See also State v. Edwards, 64 Okla. Cr. 430, 82 P.2d 324 (1938). Compare Winfield v. State, 44. Okla. Cr. 232, 280 P.630, 632 (1929) ("'[i]t is the privilege of the county attorney to charge in an indictment the highest possible offense constituted by any act committed, but if he sees fit to charge a lower offense which is sustained by the evidence and which calls for the infliction of a lesser degree of punishment, a defendant cannot be heard to complain . . . .'"), with Stough v. State, 75 Okla. Cr. 62, 128 P.2d 1028, (1942) ("what charges should be filed against an individual is a matter for the discretion of the county attorney, but where the line of demarcation between offenses has a narrow margin, the safe practice, where the proof is uncertain is to charge the lesser offense"). The decision to proceed on lesser charges is therefore no more subject to challenge than the decision not to prosecute at all. And while the prosecutor's decision to modify a charge by amendment or by dismissal and refiling requires court approval in all cases of dismissal and in cases of amendment after the defendant has pleaded, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), traditionally the

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16/ Dismissals for failure to prosecute promptly, 22 Okla. Stat. Ann. §812 (1969) also do not bar reprosecution for the same offense. 22 Okla. Stat. Ann. §817 (1969).

prosecutor can expect approval where requested, see Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947), quoted at p. 25, infra.

It is against this background that State v. Hanna, 540 P.2d 1190 (Okla. Cr. App. 1975), was decided. In that case, the Court of Criminal Appeals took a state appeal from dismissal of an information charging murder in the first degree [17/] as an occasion to announce that the prosecutor's subsequent filing of a second-degree amended information was improper.

> "In conformance with our recent holding in State ex rel. Young v. Warren, Okla. Cr., 536 P.2d 965 (1965), we are of the opinion that the state's action in filing an amended information charging murder in the second degree also was erroneous, and the trial court is directed to enter an Order dismissing said information without prejudice to the State's filing a preliminary information, if it elects to do so."

540 P.2d at 1191. Hanna does not preclude amendment or dismissal, see 22 Okla. Stat. Ann. §§304, 815 (1956), and refiling lesser charges where the prosecutor is able to present evidence that the lesser offense occurred and fails to present evidence (which, assuredly the defendant has no motivation to present) that the defendant is guilty of murder in the first degree. Nor does Hanna bar the prosecutor from refiling and presenting evidence of defenses qualifying or contradicting the evidence of first degree murder presented at the initial preliminary hearing. The enforceability of the Hanna "rule" is doubtful in any case, since no party has reason to complain of a nonconforming amendment; and where there is not (as there was in Hanna) a fortuitous interlocutory appeal proceeding in which the prosecutor seeks simultaneously to justify his original charging decision while abandoning it, there

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17/ The trial court had been of the view that "armed robbery could not be committed with an electric iron, an electrical cord and heavy boots." The appellate court disagreed. Id. at 1191. Mr. Hanna was subsequently tried for murder in the first degree and convicted of manslaughter in the first degree, State v. Hanna, District Court, Cleveland County, No. CRF-75-496.

is no reason for any court to question whether his refiling reflects something more or less than his reassessment of the available evidence. Such judicial inquiry is the more unlikely inasmuch as the courts are without authority to require a capital prosecution; they can only (once again, as in Hanna) order dismissal of the less serious charge. Finally, Hanna deals merely with refilings; it neither does nor can restrict or regulate the prosecutor's initial charging determination; that determination remains as wholly discretionary and unaccountable as ever. The upshot is that an Oklahoma prosecutor retains complete and uncontrolled freedom in his original choice to charge or forgo charging a capital offense; and thereafter he retains considerable leeway, limited only by a vague [18] and virtually unenforceable directive of the Court of Criminal Appeals, to reconsider and alter his original choice [19]

2. Plea Bargaining

The plea bargain, which accounts for up to ninety percent of all criminal convictions in the nation [20] and is "used quite extensively in Oklahoma," [21] is also predominantly a matter of prosecutorial discretion. Although court approval is required

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18/ See note 35 infra.

19/ For all of the reasons that we have set forth in the text, the Hanna decision of the Court of Criminal Appeals effected no significant limitation of prosecutorial charging discretion in Oklahoma Capital Cases. Like the Young and Murray decisions discussed at pp. 25 - 28 , 29 - 36 infra, Hanna is essentially a cosmetic pronouncement which lacks operational substance. Nevertheless, we may also note that, since Hanna was not decided until September 19, 1975, it could not even arguably have affected the prosecutorial charging practices in use at the time that petitioner's case was "papered" as capital first degree murder.

20/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

21/ Note, Plea Agreements in Oklahoma, 22 OKLA. L. REV. 81, 83 (1969).

for the dismissal, partial dismissal or amendment required to allow a plea to a lesser charge, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), the county attorney "is the legal representative of the state charged with the responsibility of investigating and prosecuting all public offenses, [and] the trial judge will ordinarily accept his recommendation and dismiss the action." Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280, 286 (1947).

It is true that, in an interlocutory proceeding brought to challenge trial court orders changing venue and granting bail in a capital case,[22/] the Court of Criminal Appeals noted that plea discussions had been had and thereupon announced that guilty pleas to lesser charges could not be entered in a capital case unless the State established "by competent evidence" "that the defendant . . . was guilty of the lesser included offense, and not Murder in the First Degree," State ex rel. Young v. Warren, supra, 536 P.2d 965, 971[23/] (1975).[24/] The Young opinion leaves unclear whether the State is required to convince the court of the defendant's guilt of the lesser and innocence of the greater charge, or merely to show that there is sufficient evidence to raise a question as to which crime was committed. But surely no party to a

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22/ State ex rel. Young v. Warren, supra, Application and Petition dated March 7, 1975 (Okla. Ct. of Cr. App. No. O-75-103.)

23/ See pp. 14-15 supra. This felony-murder prosecution, involving six codefendants, resulted in two discharges on the basis of grants of immunity. Id. at 968, two death sentences, State v. Henson, Muscogee County District Court, No. CRF-74-355 (1975), State v. Bias, Creek County District Court, No. CRF-74-123 (1975), and two pleas to manslaughter in the first degree after testimony that the defendants were intoxicated at the time of the offense. State v. Gregory, Creek County District Court, No. CRF-74-123 (1975); State v. Gibson, Creek County District Court, No. CRF-74-123 (1975).

24/ At the same time, the court specifically announced that grants of immunity, see, Okla. Constitution Ann., Art. 2 §27; 21 Okla. Stat. Ann. §1367, remained acceptable in capital and in non-capital cases. See note 23, supra.

proposed plea agreement will be motivated to contest the sufficiency of evidence that the defendant is guilty only of the lesser offense. Enforcement of the Young "rule," like the Hanna "rule," supra, therefore depends upon a decision of the trial judge to make an unsolicited, independent evaluation of the facts of the case -- or upon the initiation of an unrelated incidental proceeding which might provide the occasion for an appellate pronouncement.

Whether for this reason or because (as we shall see at note 35 infra) the imponderable quality of the legal elements that set off first degree murder from its lesser included offenses ordinarily makes it impossible for a trial court to rule out the propriety of a less-than-first-degree-murder conviction, the fact is that plea bargaining continues in Oklahoma capital cases after and notwithstanding Young. Indeed, in an informal survey limited in time and resources, counsel have been able to document fourteen (14) plea bargains in capital cases since Young:

> Jerry Wayne Freeman, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Dean Joseph Odom, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to merder in the second degree and was sentenced to ten years to life imprisonment.
>
> Charles Edward Anderson, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to first degree manslaughter and was sentenced to forty years imprisonment.
>
> William Eugene Craine, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to manslaughter in the first degree and was sentenced to forty years imprisonment.
>
> Richard Allen Pinkinpaugh charged with murder for hire in the District Court, Oklahoma County, No. CRF-74-1542 pleaded guilty on January 13, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Gary Dale Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Raymond Lee Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Phillip Brandon Ervin, charged with murder in the course of armed robbery, District Court, Cleveland County, No. CRF-75-87, pleaded guilty on May 27, 1975 to manslaughter in the first degree and was sentenced to twenty years imprisonment.

Kenneth Eugene Haxwell, charged with murder in the course of robbery with firearms, Oklahoma County District Court, No. CRF-75-60, pleaded guilty on November 19, 1975 to manslaughter in the first degree and was sentenced to ten years imprisonment.

Charles Henry Hilliard, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on November 13, 1975 to manslaughter in the first degree and was sentenced to seven years, three to be served in the penitentiary and the remainder to be suspended.

Glen Raymond Parker, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on September 29, 1975 to murder in the second degree and was sentenced to ten years to life imprisonment.

Allen Clayburn Justus, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-109, charge dismissed June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF 74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Bobby Joe Williams, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-108, charge dismissed, June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF-74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Richard Sonny Erwin, charged with murder of a child, District Court, Pottawatomie County, No. CRF-75-181, pleaded guilty on January 9, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Whether the prosecutorial decisions to make these compromise dispositions were based exclusively upon an evidentiary showing that the crimes in each case were "not Murder in the First Degree" as initially charged, State ex rel. Young v. Warren, supra, 536 P.2d at 971, is, in the nature of the plea-bargaining process, an inscrutable question. Obviously, however, the defendants would have little incentive to charge-bargain in cases where the evidence could only make out less than first degree murder. So it is most likely that post-Young bargains are being made -- as plea bargains have always been made in Oklahoma -- upon a broader basis that includes consideration of the nature of the crime,[25] "the age, record, attitude, and mental condition of the accused," "the strength of the prosecutor's case and the identity of his witnesses"[26] and the philosophy and attitudes of the local prosecutor.[27] [28]

25/ Note, Plea Agreements in Oklahoma, 22 Okla. L. Rev. 81, 83 (1969).

26/ Id. at 84.

27/ Id. at 83:

> "One prosecuting attorney said that he simply would not negotiate with one who is accused of [murder]; . . . however, another prosecuting attorney said that due to the unpredictability of juries, no matter how serious the crime, he will consider a negotiation to make sure that the accused gets some kind of punishment."

28/ In addition, we may note that the Young case was not decided until May 7, 1975. See note 19 supra.

3. Jury Discretion

An Oklahoma jury may, in any case,

> "find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged. . . ." 29/

Multiple-count indictments or informations charging offenses of varying severity in the alternative are authorized, 30/ under which the jury may convict of lesser offenses not technically "included" in the greater. The only limitation upon a capital jury's power in these regards is defined by §701.3 of the 1973 capital punishment statute (pp. 3-4,11-12 supra), which forbids the submission of evidentially unsupported lessers, Murray v. State, 528 P.2d 739, 740-741 (Okla. Cr. App. 1974), and provides that a trial judge who instructs the jury upon "lesser and included offenses and lesser degrees of homicide . . . shall state into the record his reasons for giving the instructions based upon the evidence adduced at trial."

29/ Okla. Stat. Ann. tit. 22, §916. See also, 22 Okla. Stat. Ann. §915:

> "Whenever a crime is distinguished into degrees, the jury, if they convict a defendant, must find the degree of the crime of which he is guilty."

30/ "[A]n indictment or information must charge but one offense, but where the same act constitutes different offenses, or the proof may be uncertain as to which of the two or more offenses the accused may be guilty of, the different offenses may be set forth in different forms or degrees under different counts."

22 Okla. Stat. Ann. §404 (1969).

The Murray case just cited was -- like the Hanna and Young cases previously discussed[31] -- an opinion in which the Oklahoma Court of Criminal Appeals pronounced its views upon an issue neither presented nor argued before it, in an apparent concern to ease the tension between Furman and the 1973 law. Two jointly tried defendants, indicted for first degree murder and convicted of second degree murder, urged upon appeal that their pretrial motions for a severance and separate trials had been improperly denied. They prevailed on this contention, and therefore secured reversal of their convictions. The Court of Criminal Appeals added:

> "From a review of the record we further find that the trial court instructed the jury on the offense of Murder in the Second Degree, this being the crime for which the defendants were convicted. It is our opinion, and we so hold, that the evidence in this case did not warrant a Second Degree Murder instruction. The evidence presented was that there was an armed robbery and a homicide. Under this evidence the defendants were either guilty of Murder in the First Degree, or nothing. . . . Therefore, on a retrial of this matter, the trial court should not instruct the jury on the offense of Murder in the Second Degree."

528 P.2d at 740-741. Perhaps because of the way in which the issue arose (or, more accurately, did not arise) in Murray, the court not merely overlooked the impossibility of retrying the

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31/ See pp. 23-28 supra.

defendants for first degree murder,[32] but also failed to explain how -- in any live controversy upon a concrete factual record -- an Oklahoma trial or appellate court could rule as a matter of law that the evidence does not warrant a less-than-first-degree murder instruction. For under Okla. Stat. Ann. §701.1 (1975-1976 Supp.), pp.2-3 supra, neither robbery-murder nor murder in any of the ten enumerated statutory situations constitutes first degree murder unless it is also premeditated; and the presence or absence of the mental state of premeditation is a jury question. It was for this reason, for example, that the trial judge in petitioner's case charged the jury on first degree manslaughter (see pp. 7 - 8 supra), although petitioner had killed a police officer within §701.1(1).

32/ See Price v. Georgia, 398 U.S. 323 (1970). In the case of Murray's codefendant, indeed, the United States District Court for the Western District of Oklahoma has already held that double jeopardy bars the retrial "on the charge of Murder in the First Degree" ordered by the Court of Criminal Appeals in Murray v. State, supra, 528 P.2d at 741. See Grizzle v. Turner, 387 F. Supp. 1 (W. D. Okla. 1975).

Murray does not purport to change the settled law of Oklahoma that, in homicide cases, the court must submit to the jury an instruction upon every degree of homicide which any reasonable view of the evidence suggests, Isaac v. State, 83 Okla. Cr. 33, 172 P.2d 806, 808-809 (1946);[33] that the judge is not to weigh the evidence in formulating his instructions, Lawson v. Territory, 8 Okla. 1, 56 P. 698, 700 (1899);[34] that "[w]here the evidence shows any element of manslaughter, however slight, an instruction defining that degree of homicide is proper," Ging v. State, 31 Okla. Cr. 428, 239 P. 685, 688-689 (1925); that "if there is any doubt about the matter in the mind of the court, the lower degree of the homicide should be submitted for the consideration of the jury," Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 383 (1942); that lesser-offense submissions will be sustained even upon "rather a strained construction" of the evidence, Warren v. State, 6 Okla. Cr. 1, 115 P. 812, 817 (1911); that factual questions regarding a defendant's

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33/ Lesser-offense instructions may be required by the evidence even in the absence of a defense request. See, e.g., Myers v. State, 480 P.2d 950, 952 (Okla. Cr. App. 1969).

34/ Thus, for example, the uncorroborated testimony of a defendant suffices to support and require a lesser-offense charge. Shirey v. State, 520 P.2d 701, 703 (Okla. Cr. App. 1974).

mental state are ordinarily jury issues requiring submission of lesser-offense instructions, Laymon v. State, 513 P.2d 883, 885 (Okla. Cr. App. 1973); Gibson v. State, 501 P.2d 891, 899-900 (Okla. Cr. App. 1972); and, in particular, that any "reasonable doubt . . . as to whether or not the killing was committed with a premeditated design to effect . . . death" supports a lesser offense instruction, Jones v. State, 523 P.2d 1126, 1132 (Okla. Cr. App. 1974) -- even where, as in Jones, the defendant's version of the relevant events is that he was out of the room when his alleged victim committed suicide. In the framework of these principles, it will be the rare case, if any, where the element of "premeditated design" that is prerequisite to a capital first degree murder conviction will not require factual resolution by the jury and support a lesser-offense instruction, thus performing its historic office of "giving [the jurors a] . . . dispensing power [veiled] . . . in a mystifying cloud of words," CARDOZO, LAW AND LITERATURE 100 (1931). For this element "is so obscure that no jury hearing it for the first time can fairly be expected to understand it," ibid.;[35/] and it therefore represents

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35/ The elements which define first degree murder, second degree murder, and manslaughter are exceedingly amorphous. First degree murder (and one form of second degree murder) are characterized by a "premeditated design to . . . effect death." Okla. Stat. Ann. tit. 21, §§701.1, 701.2(1)(1975-1976 supp.). "Design" and "Premeditation" are statutorily defined:

> "Design to effect death inferred[.] A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed"; (Okla. Stat. Ann. tit. 21, §702 (1958));

the classic archetype of those ungraspable mental elements so

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35/ cont'd.

> "Premeditation[.] A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution"; (Okla. Stat. Ann. tit. 21, §703 (1958)).

The Court of Criminal Appeals has frequently discussed the concept of "premeditated design":

> "'A premeditated design under our law need not be entertained for any appreciable length of time. It may be a design formed instantly before committing the act by which it is carried into execution . . . The time requisite to constitute premeditated design may not be distinguishable from the act of the killing, although it may be said to precede the act . . . Premeditation is an intent before the act of killing. It means entertainment by the mind of a design to kill, and is often defined as "thought of beforehand, any length of time, however short." However, the word "premeditatedly" does not mean "thought of" in the sense of "thought over."'"

Easley v. State, 78 Okla. Cr. 1, 143 P.2d 166, 170 (1943)(quoting Basham v. State, 47 Okla. Cr. 204, 287 P. 761, 762 (1930)). Moreover, "'[a] premeditated design to effect death * * * is no more nor less than a mental purpose to take human life.'" Walker v. State, 91 Okla. Cr. 1, 214 P2d. 961, 963 (1950). This mental purpose is "'"formable on the instant preceding the fatal act or some time theretofore, it being sufficient that there be a precedent existence of the purpose and persistency of it to and inclusive of such fatal act."'" Easley v. State, supra, 143 P.2d at 171. See also Jones v. State, 94 Okla. Cr. 359, 236 P.2d 102, 107 (1951); Miller v. State, 523 P.2d 1118, 1122 (Okla. Crim. App. 1974)(defendant could have formed premeditated design to kill between firing second and third pistol shot while he engaged in drunken horseplay). Moreover, "[i]f a killing is occasioned by the use of a deadly weapon, then the design to effect death may be inferred from the fact of the killing." Gatewood v. State, 80 Okla. Cr. 135, 157 P.2d 473, 475 (1945).

A similar gloss does not exist for the element defining one form of second degree murder, "a depraved mind, regardless of human life," see Holmes v. State, 6 Okla. Cr. 541, 119 P. 430, 440 (1911), although Okla. Stat. Ann. tit. 21, §705 (1958) provides that a homicide perpetrated by an act "imminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others." See generally, CANNON, AN ANALYSIS OF THE NEW MURDER LAW OF OKLAHOMA (1974).

"refractory to the best-instructed human understanding"[36] that they not merely permit but inescapably require any jury to "conceal from itself its own response to sentiment, under the guise of resolving issues of evidential doubt."[37]

> "[N]o matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve lay persons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless."[38]

And if "'[i]t sometimes happens [that] the jury, in arriving at a verdict, does so by a compromise and fixes a lower degree than the undisputed evidence may disclose,'" Abel v. State, 507 P.2d 569, 572 (1973), (quoting Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 384 (1941)), surely this extra-legal process is most likely to reflect the "natural human tendency to see

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36/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 299 (1971).

37/ KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

38/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

facts and to evaluate evidence in a manner leading to a desired conclusion"[39] where the stakes are life or death[40] and where the enormity of those stakes is forcibly brought home to the jurors by the requirement that they "state affirmatively in their [first degree murder] verdict that the defendant shall suffer death."[41]

39/ BLACK, op. cit. supra note 38, at 46.

40/ The resort by juries even to verdicts of acquittal as a means of avoiding capital convictions" in cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty" is an historical commonplace. McGautha v. California, 402 U.S. 183, 199 (1971). See the authorities collected in the Brief for Petitioner, Fowler v. North Carolina, No. 73-7031, at pp. 90-92 n.122.

41/ Okla. Stat. Ann. tit. 21, §701.3 (1975-1976 Supp.), p. supra. The Court of Criminal Appeals has indicated that the omission of such a statement would not have the legal effect of sparing the defendant's life, Williams v. State, supra, 542 P.2d at 578-79, but the requirement serves nonetheless to assure that the jury is aware of the life-or-death consequences of its choice of a verdict.

4. Executive Clemency

Under Okla. Const. Ann., art. 6, §10 (1952), and 57 Okla. Stat. Ann. §332 (1969), the Governor of Oklahoma possesses absolute power to commute and pardon -- or to decline to commute or pardon -- as he chooses. The only limitation upon these powers as they apply to capital cases is the requirement that, before the Governor may permanently change a sentence to be served, he must receive a recommendation in the case from the Board of Pardons and Paroles. He need not follow the recommendation, but need only receive it. There are no restrictions or controls upon -- or standards, rules or principles to regulate -- the Board's discretion or the Governor's. "An abuse of the pardoning power [which is conferred in the same terms as the power of commutation] does not authorize the courts to decline to give effect to a pardon, and no court has the power to review the action of the executive in granting a pardon . . . . "Ex parte Crump, 10 Okla. Cr. 133, 135 P.428, 431 (1913).

Since the Court now has before it lengthy briefs in cases from five States raising the question of the constitutionality of capital punishment under the Eighth Amendment, we see no reason to extend the present petition beyond description of the local Oklahoma doctrines, practices and procedures that present a similar question in petitioner's case. Oklahoma's system for the administration of the death penalty differs in details from those of Florida, Georgia, Louisiana, North Carolina, and Texas -- just as the systems of the latter five States differ from each other in details -- but the differences are insignificant in contrast to the similarities. Arbitrary selectivity in

the choice of those who die or live remains the common characteristic of death-sentencing schemes from State to State, after Furman as before, and however much the numerous discretionary judgments which together doom or spare be diffused, disguised, or papered over with the language of "mandatory" or "automatic" death penalties. For, in fact,

> "[t]he change to a mandatory system . . . [simply has] the effect of shifting some of the discretion exercised by the jury [before Furman] to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty."42/

B. The Excessive Cruelty of the Death Penalty

This aspect of the Eighth Amendment question presented here is identical to the questions raised in the Fowler, Proffitt, Gregg, Roberts, Woodson-Waxton and Jurek cases, p. 20 supra, and discussed particularly in the respective Parts III of the Briefs for Petitioner in Fowler (No. 73-7031) and Jurek (No.75-5394).

42/ White, The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment, 13 DUQ. L. REV. 279, 289 n.69 (1974). See also BLACK, op. cit. supra note 38, at 92-93.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6453

JONEY JOE LUSTY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

BRIEF OPPOSING CERTIORARI

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I N D E X

Subject Index

Cases Cited

Statutes Cited

Articles of Constitution Cited

Other Authorities Cited

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	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Jone Joe Lusty, hereinafter referred to as petitioner, was convicted of Murder in the First Degree. His sentence of death was affirmed on appeal to the Oklahoma Court of Criminal Appeals, reported below as Lusty v. State, Okl. Cr., 542 P.2d 545 (1975).

Mandate was stayed below pending resolution of related issues raised in the Petition for Rehearing in Williams and Justus v. State, Okl. Cr., 542 P.2d 554 (1975) and oral argument was presented upon consolidated hearing. Thereafter, petitioner's judgment and sentence was reaffirmed for reasons stated in the Opinion on Rehearing in the leading case, Williams and Justus v. State, supra, at page 591.

REASONS FOR NOT GRANTING WRIT

Invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6 by Oklahoma Court of Criminal Appeals raises no constitutional issue where, as here, petitioner is not within the class addressed by stricken statutes. Invalidation thereof is not within the ex post facto proscription of Article I, §10 of the United States Constitution, nor deprives petitioner of any constitutional right.

Oklahoma's mandatory scheme of capital punishment does not permit infliction of the death penalty contra to Furman v. Georgia, 408 U.S. 238 (1972), nor is death sentence imposed otherwise cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendment of the United States Constitution.

Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution were not violated by Court authorized separation of juror.

ARGUMENT AND AUTHORITIES

I.

INVALIDATION OF 21 O.S. SUPP. 1974, §§701.5, 701.6 BY OKLAHOMA COURT OF CRIMINAL APPEALS RAISES NO CONSTITUTIONAL ISSUE WHERE, AS HERE, PETITIONER IS NOT WITHIN THE CLASS ADDRESSED BY STRICKEN STATUTES; INVALIDATION THEREOF IS NOT WITHIN CONSTITUTIONAL EX POST FACTO PROSCRIPTION OF ARTICLE I, §10 OF THE UNITED STATES CONSTITUTION, NOR OTHERWISE DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT.

Petitioner's contention is based upon the invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6[1], which he claims[2] deprived him of the opportunity for an evidentiary hearing contemplated therein, thereby negating the possibility of a reduced sentence.

As stated in Section 701.5, the purpose of the evidentiary hearing was to determine if the sentence of death comports with the principles of due process and equal protection of the law. The evidentiary hearing contemplated therein was duplicitous, as recognized by the State Appellate Court.[3]

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1. Quoted verbatim, petitioner's brief, page 5.

2. Petitioner's brief, Appendix B, page 14.

3. Opinion on Rehearing, Williams and Justus v. State, Okl. Cr., 542 P.2d 591, at page 594.

Petitioner has never contended that his sentence was a result of any factor listed within the stricken statutes, although expressly invited to do so during oral argument below.[4] Certainly, any factor or evidence regarding such constitutional protections as due process and equal protection could have been presented to the trial court and reviewed on appeal, notwithstanding the stricken statutes. At this late date, petitioner has yet to make such claim, presumably because he is not among the class of persons within the purported ambit of the stricken provisions.[5]

Petitioner's claim that the instant case is squarely controlled by a prior decision of this Court,[6] misconstrues the holding therein. In the cited case, the penalty for Grand Larceny at the time of the offense was "for not more than 15 years." The Legislature changed the law after the commission of the crime, but before sentencing, making the 15 year sentence mandatory. This Court held the new law was ex post facto because the legislative change occurred after the crime was committed.

In the instant case, the mandatory penalty of death under 21 O.S. Supp. 1974, §701.3 was in effect at the time of the offense and during the time the petitioner was charged, tried, convicted and sentenced to death. Subsequently, the State appellate court held the provisions of 21 O.S. Supp. 1974, §§701.5, 701.6 unconstitutional. Those provisions purportedly authorized the appellate court to modify the death sentence only if such death sentence was found to have been a result of specified factors therein which resulted in denial of due process or equal protection of the law.

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4. 542 P.2d at page 550.

5. In Williams and Justus v. State, Okl. Cr., 542 P.2d at page 597, the State court specifically found that appellants there were not within the class of persons contemplated within the stricken statutes.

6. Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), petitioner's brief, Appendix B, page 18.

Petitioner has made no claim at any time, during trial, on appeal, or in his petition for certiorari, that his death sentence was affected by any factor within the stricken provisions.

This Court has never held that the purpose of the ex post facto clause was to serve as a restraint upon the judiciary, but has, in fact, held contra in Ross v. Oregon, 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913); Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); and United States v. Rundle, 383 F.2d 421 (3rd Cir. 1967), cert. denied, 393 U.S. 863, 89 S.Ct. 144, 21 L.Ed.2d 131. The provision was intended to secure substantial personal rights against arbitrary and oppressive legislation. See Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915). Respondent is fortified in this position by the history of the ex post facto clause. See, e.g., Ex Post Facto in the Constitution, 20 Michigan Law Review 315 (1921) and The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws, 14 University of Chicago Law Review 539 (1947).

Although the due process clause is admittedly a brother to the ex post facto provision, there exists a danger in treating them alike. See separate opinion by Justices Harlan and Frankfurter in James v. United States, 366 U.S. 213, 247, 6 L.Ed.2d 246, 269, 81 S.Ct. 1052 (1961). In Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), this Court considered ex post facto rationale in deciding a due process question. There, this Court held that the State appellate court had enlarged the meaning of the statute and the defendants were thereby denied due process question. There, this Court held that the State appellate court had enlarged the meaning of the statute and the defendants were thereby denied due process because they

had no notice that their actions constituted a criminal offense at the time of their acts. This decision is nowhere analogous to the instant case. Other cases cited by petitioner are likewise distinguishable.

II.

OKLAHOMA'S SCHEME OF MANDATORY CAPITAL PUNISHMENT DOES NOT PERMIT INFLICTION OF THE DEATH PENALTY CONTRA TO FURMAN V. GEORGIA, 408 U.S. 238 (1972), NOR IS THE DEATH SENTENCE IMPOSED UPON PETITIONER OTHERWISE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Generally, petitioner cites a number of cases antedating current capital punishment statutes with the inference that the former affects the latter. However, Oklahoma's procedure was significantly changed by the enactment of current capital punishment legislation and respondent submits that no State in the Union has exceeded Oklahoma in curbing arbitrary discretion.

PROSECUTORIAL DISCRETION

To say that the prosecutor has no discretion in determining the charge to be filed would be inaccurate, because admittedly he does. No system has yet been devised, if indeed such a system is possible, to ensure that the prosecutor uses correct judgment in the selection of the charge to be filed. However, this is not to say that the prosecutor has unlimited discretion. Petitioner recognizes that once a charge is filed, any action relating to the disposition thereof requires court approval.[7] Oklahoma procedure also requires the examining magistrate at a preliminary

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7. Petitioner's brief, Appendix B, page 22.

hearing to direct the accused to be held for trial on a charge which the evidence reflects, nor necessarily the crime charged.[8]

Further, in response to Furman, the Oklahoma Court of Criminal Appeals has held that once the accused has been arraigned for a capital offense, the State cannot simply enter into a plea bargain agreement. The State must establish by competent evidence that the accused committed the lesser offense and is not guilty of Murder in the First Degree as a predicate for the District Court to approve a reduction of the charge. State ex rel. Young v. Warren, Okl. Cr., 536 P.2d 965 (1975).

JURY DISCRETION

Oklahoma requires assessment of the death penalty upon the conviction of Murder in the First Degree, 21 O.S. Supp. 1974, §701.3. Petitioner stresses that Oklahoma procedure also provides for instructing the jury regarding a lesser included offense,[9] but only where warranted by the evidence. Surely petitioner does not suggest such instruction should not be given irrespective of the evidence, for such procedure most certainly would be fundamentally unfair to any

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8. 22 O.S. 1971, §264, provides:

> "Defendant held to answer.
>
> "If, however, it appears from the examination that any public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must in like manner indorse on the complaint an order signed by him to the following effect:
>
> "It appearing to be that the offense named in the within complaint mentioned (or any other offenses, according to the fact, stating generally nature thereof), has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same."

9. Petitioner's brief, Appendix B, pages 29-36.

accused. Petitioner's argument in this regard inherently calls for condemnation of jury determination in capital cases and necessarily presents a separate and distinct approach regarding the constitutionality of the death penalty itself. If this Court should adopt petitioner's concept, then our present system of criminal jurisprudence must necessarily be dismantled, for the traditional role of a juror to judge the credibility of witnesses, weigh the evidence and be a trier of fact, is inextricably woven into our system of justice.

Delaware is the only jurisdiction respondent notes to seemingly accept the view that prohibitive discretion remains where the judge or jury trying the case may find the accused guilty of a lesser included offense, State v. Sheppard, Del.Sup., 331 A.2d 142 (1975) citing dictum from State v. Dickerson, Del. Sup., 298 A.2d 761, 769-770 (1972). Other jurisdictions do not accept this view, e.g., State v. Selman, La., 300 So.2d 467 (1974); State v. Dixon, Fla., 283 So.2d 1 (1973); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); Jurek v. State, Tex.Crim.App., 522 S.W.2d 934 (1975).

EXECUTIVE CLEMENCY

Oklahoma has held the possibility of executive clemency under Article VI, §10 of the Oklahoma Constitution not to be repugnant to either the State or Federal Constitutions, Williams and Justus v. State, supra.

In the post-Furman case of Shick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974), this Court recognized that the very essence of the pardoning power is to treat each case individually and that individual acts of clemency inherently call for discriminating choices, because no two cases are the same.

III.

PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY COURT AUTHORIZED SEPARATION OF JUROR.

As the Oklahoma Court of Criminal Appeals noted, 542 P.2d at page 549, a lone juror was separated from other jurors before submission of the case because her home had been burglarized. The police needed a statement concerning any property that might be missing and the juror's husband was out of town. All parties to the case, including a bailiff, accompanied the lone juror to her home while the remainder of the jury was kept in custody of the regular bailiff. The State Court also noted that she was not prejudiced against petitioner as a result of these circumstances.

Respondent submits the procedure used was not a denial of petitioner's right to an impartial jury and his argument is based upon pure speculation. He has cited no case analogous to the factual situation in the instant case.

The trial court is vested with discretion in permitting the jury to separate before the case is submitted, 22 O.S. 1971, §853, but petitioner's brief, at page 15, suggests the trial court should have taken the convenient, prudent alternative of seating the alternate juror. However, the seating of an alternate juror is governed by 22 O.S. 1971, §601(a), which authorizes seating only in case of illness or death of a regular juror. Thus, on appeal to the State court, the petitioner could have claimed error had the trial court seated the alternate juror.

CONCLUSION

Therefore, premises considered, it is respectfully

submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the instrument to which this certification is attached to the following named counsel of record, this 23rd day of April, 1976:

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